

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DARNELL JONES,

Defendant-Appellant.

UNPUBLISHED
February 15, 2011

No. 287201
Wayne Circuit Court
LC No. 07-024701-FC

Before: TALBOT, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, carjacking, MCL 750.529a, assault with intent to rob while armed, MCL 750.89, two counts of assault with a dangerous weapon, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to terms of seventeen and one-half to fifty years in prison on each of the armed robbery and carjacking convictions, to terms of two to four years in prison on each of the three assault convictions, and to the mandatory two-year consecutive term on the felony-firearm conviction. He now appeals and we affirm.

The victims, Lolita Nichols and Timothy Finn, testified that they were parked on the street outside Finn's house when a Chrysler mini-van pulled up nearby. There were three individuals in the van. They both testified that they were able to clearly see defendant in the passenger seat of the mini-van for 15 to 30 seconds before observing him put on a mask and get out of the vehicle. Defendant, with a gun in his hand, approached the victims in their car and ordered them out of the vehicle. Defendant fired the gun into the vehicle, blowing out a window but not hitting either victim. Both left the vehicle, Finn tossing the keys. Unable to find the keys, defendant grabbed Nichols' purse and got back into the mini-van. The three suspects departed.

Based upon a tip from a confidential informant, as well as the GPS tracking information from the victim's cell phone which had been in the stolen purse, the police went to an address on Chandler Park Drive. They observed a Chrysler mini-van in the garage which matched the description of the suspect vehicle, including a partial license plate number supplied by Nichols. A subsequent consent search of the house yielded evidence of the crime, including Nichols' cell phone. Defendant was one of several people present in the house and was arrested.

Defendant first argues on appeal that he was denied effective assistance of counsel when trial counsel failed to present evidence that another individual, Alex Copeland, had admitted to the crime. Defendant preserved this issue for review by successfully moving in this Court for a remand for a *Ginther* hearing.¹ At that hearing, trial counsel testified that he had been approached by some family members of defendant stating that Copeland had made threats against defendant if defendant tried to implicate Copeland in the robbery. He testified that he did not bring Copeland forth as a witness as he did not know where Copeland was and that he did not have the family members testify as to Copeland's admission to his involvement in the crime because there was no corroborating evidence of Copeland's statements.

To establish ineffective assistance of counsel, the defendant must show that defense counsel's performance fell below an objective standard of reasonableness and that, but for the counsel's error, there was a reasonable probability of a different outcome in the proceedings. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Initially, we are somewhat troubled with defense counsel's explanation of being unable to locate Copeland. Defendant was arrested at the Copeland residence, which address was recorded in the police report. It does not appear from the record that counsel made any attempt to locate Copeland at that address or to have him served with a subpoena. On the other hand, we are not persuaded that this failure was particularly prejudicial to defendant. First, it is unclear what, if anything, Copeland would have testified to had he been produced as a witness. If he was, in fact, involved in the robbery, it would seem likely that he would invoke his Fifth Amendment privilege against self-incrimination and refuse to testify. In fact, Copeland did not testify at the *Ginther* hearing and the parties stipulated that, if called, Copeland would invoke his Fifth Amendment privilege.

Furthermore, although it is unclear what role this information played in counsel's decision not to pursue Copeland as a witness, we do note that counsel testified that defendant had admitted to him that he was present during the crime. Thus, even if Copeland had appeared to testify and admit his own involvement in the crime, it carried the risk that Copeland would also have implicated defendant as being involved in the crime.

Next, there is the matter of the family members who would have testified that Copeland admitted to them that he was the man with the gun during the robbery. We agree with defendant that his trial counsel may have been a bit too quick to dismiss the admissibility of the testimony of witnesses regarding Copeland's alleged statement. At the *Ginther* hearing, trial counsel testified that he did believe he could present the witnesses' testimony regarding Copeland's alleged statement because "anytime that you have a claim by an unavailable declarant that incriminates themselves and exculpates the defendant you must you need [sic] independent evidence in order to corroborate what he's saying." Under MRE 804(b)(3) a "statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

“Corroborating circumstances” does not necessarily mean “independent evidence” as trial counsel suggests. This requirement is extensively analyzed in *People v Barrera*, 451 Mich 261; 547 NW2d 280 (1996), and that case does not suggest the need for independent evidence. Rather, it looked to the circumstances surrounding the making of the statement. See 451 Mich at 272-276.

Nevertheless, we do not believe that we need to resolve the corroboration issues because, even if we were to conclude that the testimony of the witnesses would have been admissible, we do not believe that defendant can establish the prejudice element of the ineffective assistance of counsel test. That is, we do not believe that defendant can show that, even had the testimony been admitted, there is a reasonable possibility that the jury would have acquitted him. There was strong evidence against defendant. The victims made a strong identification of defendant after having had an opportunity to observe him before putting on the mask. Moreover, a couple of hours after the robbery, defendant was found at the same location as the victim’s cell phone and the mini-van used in the robbery. Indeed, when the police requested permission to enter that location, defendant told the woman at the door not to let the police in and said, “You’re not getting in here without a warrant.” Given that defendant had no privacy interest in the house, his statement would seem to reflect a consciousness of guilt rather an invocation of his constitutional rights.

On the other hand, the evidence in favor of defendant is weak at best. The witnesses who testified at the *Ginther* hearing regarding Copeland’s alleged statement were defendant’s sister, Boreetha Skoric, and his cousin, Karim Hadden, rather than independent witnesses. Skoric testified at the hearing that Copeland told her that he (Copeland) “was the shooter of the whole robbery that’s all he said basically.” Although Hadden reported a similar confession by Copeland, it was made only after defendant was convicted and, therefore, Hadden would not have been able to testify at defendant’s trial. Moreover, neither indicated that Copeland exonerated defendant—that is, he did not explicitly state that defendant was not involved in the robbery.

In sum, we are not persuaded that the jury would have reached a different conclusion had they heard defendant’s sister’s testimony that Copeland had admitted to her his own involvement in the robbery, an admission that apparently did not include excluding defendant as one of the three individuals in the van.

Defendant also raised an issue related to the scoring of the sentencing guidelines in his original brief on appeal. But that issue appears to have been adequately addressed on remand.

Defendant has also raised a number of issues in a supplemental brief filed in propria persona. First, defendant raises a number of arguments regarding ineffective assistance of trial counsel. In addition to reiterating the argument regarding the failure to investigate the alleged Copeland confession, defendant argues that trial counsel failed to file a motion and failed to present an alibi defense. With respect to the failure to file a motion, defendant does not identify what motion counsel should have filed. Therefore, we cannot assess that such a motion would have been successful. With respect to the alibi defense, defendant fails to identify any specific witness that should have been presented to establish an alibi. Moreover, given trial counsel’s testimony at the *Ginther* hearing that defendant had admitted to him that he was present at the

time of the crime, we fail to see how counsel could have presented any alibi defense without improperly presenting knowingly perjured testimony.

Next, defendant argues that he was denied a fair trial by the admission of evidence regarding the pretrial identification procedure. Defendant argues both that it was improper to use a photo array rather than a corporeal line-up and that the photo array was improperly suggestive. Defendant, however, has not established that he preserved this issue for appeal by raising a timely objection in the trial court. See *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

Next, defendant argues that there was insufficient evidence to support his convictions. Defendant, however, merely argues that there was inadequate evidence to support identifying him as the perpetrator of the crimes. The victims positively identified defendant as the perpetrator. It was for the jury to assess the credibility of that identification and, if they found it to be believable, it was sufficient to establish defendant's guilt. See *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998).

Finally, defendant argues that he received ineffective assistance of appellate counsel. Defendant, however, fails to identify any error by appellate counsel, making only a generalized statement that counsel failed "to raise an issue which was obvious from the trial record and which would have resulted in a reversal on appeal." If such an obvious issue existed, perhaps defendant should have raised it in his pro per brief.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Michael J. Kelly